

IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

FILED

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U.S. DISTRICT COURT  
MIDDLE DISTRICT OF FL  
ORLANDO FLORIDA

SCOTT BRANCHEAU, MARION )  
LOVERDE, CHARLES LOVERDE, and )  
DEBORAH FROGAMENI, )

Plaintiffs, )

v. )

Case No.

6:11-CV-1416-DRL-31 DAB

HILDA L. SOLIS, SECRETARY OF )  
LABOR, U.S. DEPARTMENT OF )  
LABOR, DAVID MICHAELS, )  
ASSISTANT SECRETARY OF )  
LABOR; and OCCUPATIONAL )  
SAFETY AND HEALTH )  
ADMINISTRATION, )

Defendants. )

COMPLAINT

Plaintiffs, Scott Brancheau, Marion Loverde, Charles Loverde, and Deborah Frogameni, ("Plaintiffs") by and through undersigned counsel, file this complaint for declaratory and permanent injunctive relief against the United States Department of Labor ("DOL") and the Occupational Safety and Health Administration ("OSHA"), and state as follows:

INTRODUCTION

1. This is a "reverse" Freedom of Information Act ("FOIA") suit. Plaintiffs are the husband, mother, brother and sister of Dawn Brancheau ("Dawn"), an animal trainer who was tragically killed on February 24, 2010, in Orange County, Florida. Dawn's death was investigated by the Orange County Sheriff's Office, the state medical examiner and, subsequently, by OSHA.

2. The Sheriff and the medical examiner agreed, after Plaintiffs brought a state court action, to keep confidential video recordings and photographs that were created or collected during their investigations (“Death Scene Materials”). The state court entered a permanent injunction barring release of the Death Scene Materials.

3. OSHA, in contrast, has refused to assure Plaintiffs that that the Death Scene Materials it obtained from the Sheriff or medical examiner will be kept confidential. In addition, it has produced records to Plaintiffs and several media requesters containing a detailed summary of a video depicting Dawn’s death. Even OSHA has apparently conceded that the production of these materials was a mistake. Nonetheless, OSHA’s actions are arbitrary, capricious, and indefensible.

4. Plaintiffs therefore bring this action to request the Court to declare that the videos and pictures depicting Dawn, her death, and efforts to rescue her and recover her body are exempt from disclosure under FOIA Exemption 6, FOIA Exemption 7(C), and the Privacy Act. Plaintiffs request the Court permanently enjoin the Department of Labor and OSHA from publicly disclosing the Death Scene Materials.

### **JURISDICTION**

5. The Court’s jurisdiction over this action is conferred by 28 U.S.C. § 1331. FOIA, the Privacy Act, and the Administrative Procedure Act (“APA”), which are codified sequentially at 5 U.S.C. §§ 501 through 706, together supply the cause of action. Plaintiffs also invoke this Court’s authority to issue declaratory judgments under 28 U.S.C. §§ 2201-2202. Further, because the United States is a defendant, this Court has jurisdiction pursuant to 28 U.S.C. § 1346(a)(2).

### **THE PARTIES AND VENUE**

6. Plaintiff Scott Brancheau is Dawn's husband. He is a resident of Orange County, Florida. Venue in this Court is proper, therefore, pursuant to 28 U.S.C. § 1391(e) and 28 U.S.C. 1402(a).

7. Plaintiffs Marion Loverde, Charles Loverde, and Deborah Frogameni are Dawn's mother, brother and sister, respectively.

8. Defendant U.S. Department of Labor ("DOL") is a department of the Executive Branch of the United States Government. DOL administers and enforces federal laws regulating, among other things, workers' wages, safety and health conditions of workplaces, and labor unions. DOL is an agency within the meaning of the APA.

9. Defendant OSHA is a subagency of the U.S. Department of Labor with its headquarters at 200 Constitution Avenue, N.W., Washington, D.C. It also maintains an area office at 5807 Breckenridge Parkway, Tampa, Florida. OSHA administers and enforces Occupational Safety and Health Act. Like DOL, OSHA is an agency within the meaning of the APA.

### **FACTUAL ALLEGATIONS COMMON TO ALL COUNTS**

#### **The Initial Investigations**

10. Prior to her death, Dawn was employed as an animal trainer by SeaWorld Parks and Entertainment, LLC ("SeaWorld") in Orange County, Florida.

11. On February 24, 2010, during a performance of SeaWorld's *Dine With Shamu* encounter, an orca seized Dawn and caused her death by drowning and trauma.

12. The Sheriff responded to the scene of Dawn's death and, as required by law, conducted an investigation.

13. The medical examiner, which was charged by law with determining the official cause of Dawn's death, assisted in the Sheriff's investigation and also conducted its own investigation.

14. As part of their investigations, the Sheriff and the medical examiner photographed Dawn, her personal effects and clothing, and the area surrounding Dawn. These photographs graphically depict the scene of Dawn's death as well as Dawn and her personal effects and clothing. These photographs were made immediately after the incident that caused Dawn's death.

15. The Sheriff also obtained from SeaWorld two compact discs containing surveillance videos. The videos depict Dawn's death and efforts to rescue her and recover her body.

**The State Public Record Requests and the State Court Injunctions**

16. The Sheriff and medical examiner received requests from the media and animal rights groups for the disclosure of the Death Scene Materials.

17. Plaintiff brought an action in Orange County, Florida, to enjoin the Sheriff and medical examiner from publicly releasing the Death Scene Materials.

18. On March 15, 2010, the state court granted a temporary injunction barring the Sheriff and medical examiner from releasing the Death Scene Materials and also set a hearing at which all interested parties were heard.

19. SeaWorld intervened in the state court action in support of an injunction, and The Lakeland Ledger Publishing Company, d/b/a *The Ledger*, Media General

Operations, d/b/a *The Tampa Tribune*, Orlando Sentinel Communications Company, d/b/a *Orlando Sentinel*, Associated Press, and WFLA-TV Local 6 intervened in opposition to an injunction.

20. On March 25, 2010, after considering the submissions of the parties and holding a hearing in which the parties presented oral arguments, the state court extended the temporary injunction. Thereafter, the media parties withdrew from the state court action.

21. The remaining parties reached an agreement to seal certain video recordings and photographs that were obtained or created during the investigations of the Sheriff and Medical Examiner.

22. The state court entered a permanent injunction barring the public disclosure of the Death Scene Videos and all but a selection of the Death Scene Photographs on December 15, 2010. The state court explicitly found that the unrestricted viewing of the Death Scene Materials would be disturbing, humiliating and painful to Plaintiffs. The court stated that if the Death Scene Materials are disclosed to the public, their widespread dissemination and prurient and voyeuristic perusal is inevitable.

#### **The OSHA Investigation**

23. On information and belief, sometime after February 24, 2010, OSHA initiated an investigation of the circumstances of Dawn death. Personnel from OSHA's Tampa office conducted the investigation, which was designated Inspection No. 314336850.

24. Despite the March 15, 2010 preliminary injunction, personnel from OSHA's Tampa office conducting the investigation requested and received all or part of

the investigative files of the Sheriff and medical examiner, including the Death Scene Materials.

25. As the result of its investigation, OSHA issued a Citation and Notification of Penalty on August 23, 2010. The citation described several alleged violations of the Occupational Safety and Health Act of 1970 that were identified during the course of Inspection No. 314336850.

26. On information and belief, OSHA will conduct a hearing on September 19, 2011, and specifically reserves the right to exhibit the Death Scene Materials at the hearing.

**Plaintiffs' Requests for An Informal Adjudication**

27. After OSHA issued its Citation and Notification of Penalty, Plaintiffs sought assurance from it that the Death Scene Materials would not be released to the public, either in response to a FOIA request or otherwise.

28. Plaintiffs notified OSHA in writing of their privacy interests in the Death Scene Materials, and their request for nondisclosure of the videos and photographs. Plaintiffs requested further that OSHA acknowledge that Exemption 6 and Exemption 7(C) of the Freedom of Information Act are applicable to its investigative files and that it would deny any request for the public disclosure of its records.

29. Plaintiffs waited over two months for a response from the agency.

30. On November 15, 2010, Plaintiffs notified OSHA again of their privacy interest in the Death Scene Materials. Plaintiff requested that OSHA make an "affirmative decision" within 30 days as to whether it would exempt its records from public disclosure.

31. OSHA did not respond to Plaintiffs' requests until February 9, 2011, when OSHA sent Plaintiffs a computer disc containing redacted records and a letter explaining that the disk contained "the information you requested under the Freedom of Information Act." The letter did not identify any videos or photograph, and none were produced by OSHA. The records produced along with the letter, however, contained a detailed summary of one of the Death Scene Videos, ("Death Video Summary") which was not redacted. OSHA's Tampa Area Director subsequently gave deposition testimony in the currently pending administrative action and testified that the release of the Death Video Summary to FOIA requesters without redacting the summary was a mistake.

32. Plaintiffs repeatedly called OSHA during the first half of 2011 regarding its February 9, 2011 letter and "FOIA production." OSHA failed to return each call. OSHA ignored Plaintiffs' repeated requests for it to identify any photographs or videos in its records.

33. On May 6, 2011, the Plaintiffs sent DOL a "Freedom of Information Act Appeal." The letter recited OSHA's dilatory conduct and explained that the "FOIA production" was completely unresponsive to previous correspondence. Construing OSHA's response (or lack thereof) as a denial of Plaintiffs' request, Plaintiffs requested that DOL direct OSHA to prepare a cogent and proper response. The letter recited relevant legal authority and informed DOL that the Death Video Summary was shocking and disturbing to Plaintiffs.

34. DOL failed to respond for nearly three months. Because of the approaching OSHA hearing scheduled for September 19, 2011, at which the Death Scene Photographs and the Death Scene Videos might be displayed, Plaintiffs mailed letters on

August 1 and August 2, 2011, informing each agency of the need to seek relief from this Court in the event of further dilatory conduct.

35. On August 9, 2011, over eleven months since Plaintiffs first raised this issue, DOL responded to the August 1 and August 2 letters.

36. In response to the August 1, 2011 letter, the DOL apologized for substantive and procedural failures on the part of OSHA. Although DOL admitted to releasing an unredacted and detailed summary of one of the Death Scene Videos (“Death Video Summary”) in response to several FOIA requests, it refuses to inform Plaintiffs of any future FOIA request, stating that “FOIA does not provide a mechanism to provide notice to those with privacy interests, no matter how significant.” Moreover, OSHA conceded that the release of the Death Video Summary was contrary to DOL’s own determination that it should not be released pursuant to FOIA.

37. The response to the August 2, 2011 letter stated that although DOL acknowledges Plaintiffs’ significant privacy interest, the Death Scene Materials “may” be used at the September 19, 2011 hearing. DOL refused to elaborate, citing the “attorney work product doctrine.”

38. Rather than respond to Plaintiffs’ repeated requests to keep such records confidential, OSHA decided to do the exact opposite, and DOL refuses to take reasonable steps to prevent dissemination of the Death Scene Materials, which, for the moment, remain confidential. OSHA’s actions are not only arbitrary and capricious, they are indefensible, contrary to law, and deprive Plaintiffs of any meaningful pre-disclosure opportunity to assert their privacy interests.



**COUNT I**  
**(FOIA Exemption 6)**

39. Plaintiffs hereby incorporate by reference paragraphs 1-38 above.

40. Plaintiffs have a personal privacy interest in the Death Scene Videos and Death Scene Photographs. As such, those records are exempt from disclosure under FOIA Exemption 6, 5 U.S.C. § 552(b)(6).

41. Release of the Death Scene Materials by DOL or OSHA is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and (4) without observance of procedure required by law. DOL and OSHA's conduct is therefore reviewable pursuant to 5 U.S.C. § 706(2)(A), (B), (C), and (D).

**COUNT II**  
**(FOIA Exemption 7(C))**

42. Plaintiffs hereby incorporate by reference paragraphs 1-41 above.

43. As DOL has already admitted, Plaintiffs have a personal privacy interest in the Death Scene Materials. As such, those records are exempt from disclosure under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C).

44. Release of the Death Scene Materials by DOL or OSHA is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and (4) without observance of procedure required by law. DOL and OSHA's conduct is therefore reviewable pursuant to 5 U.S.C. § 706(2)(A), (B), (C), and (D).

**COUNT III**  
**(Privacy Act)**

45. Plaintiffs hereby incorporate by reference paragraphs 1-44 above.

46. Dawn is a “person” and OSHA and DOL are each an “agency,” as defined at 5 U.S.C. § 551. The Death Scene Materials indisputably pertain to Dawn and are barred from disclosure under the Privacy Act, 5 U.S.C. § 552a.

47. Plaintiffs are therefore entitled to close the portions of any OSHA or DOL hearing or meeting during which Death Scene Materials are exhibited, pursuant to 5 U.S.C. § 552b(c).

48. Plaintiffs are also entitled to notification of any pertinent FOIA request, pursuant to 5 U.S.C. § 552a(e)(8).

**COUNT IV**  
**(Declaratory Judgment Act)**

49. Plaintiffs hereby incorporate by reference paragraphs 1-48 above.

50. The Court has authority under 28 U.S.C. § 2201-2202 to declare the rights of Plaintiff with respect to the Death Scene Materials, as follows.

51. Plaintiffs have a deeply personal and intimate privacy interest in any photographs and videos in Defendants’ records which depict Dawn’s death and the immediate aftermath of Dawn’s death. The U.S. Supreme Court conclusively recognized that surviving family members hold a right to personal privacy with respect to their close relative’s death scene images in *National Archives and Records v. Favish*, 541 U.S. 157 (2004).

52. If OSHA discloses the Death Scene Materials to the public without restriction, Plaintiffs will suffer immense emotional harm not just once, but again and

again. The widespread dissemination of the Death Scene Materials would be inevitable. Plaintiffs would most certainly be forced witness their love one's death again and again given the intense media interest in Dawn's death as well as the growth of prurient and voyeuristic internet websites.

53. Defendants are prohibited by the Privacy Act from disclosing the Death Scene Materials either in response to a FOIA request or by a voluntary disclosure.

54. The Death Scene Materials are protected from disclosure by the combined action of Exemption 6 of FOIA and the Privacy Act because any disclosure would indisputably constitute an unwarranted invasion of Plaintiffs' personal privacy.

55. In addition, because the Death Scene Materials were compiled during the investigations of the Sheriff, the Medical Examiner and OSHA, such materials are protected from disclosure by the combined action of Exemption 7(C) of FOIA and the Privacy Act.

56. Taken together, OSHA's willful decision to ignore Plaintiffs' repeated requests to identify any Death Scene Materials in its records; its inexplicable decision to construe Plaintiffs' *request to withhold* certain records from public disclosure as a *request for disclosure*, and its release of the Death Scene Summary, show that OSHA has denied, in substance if not in words, Plaintiffs' requests to withhold from disclosure the Death Scene Materials.

57. OSHA's denial of Plaintiffs' requests is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

- (1) Set aside OSHA's denial of Plaintiffs' requests to withhold the Death Scene Materials from disclosure;
- (2) Enjoin Defendants from publically disclosing the Death Scene Materials for any reason;
- (3) Require OSHA to close the portions of any hearing or meeting during which Death Scene Materials are exhibited, pursuant to 5 U.S.C. § 552b(c);
- (4) Require OSHA and DOL to notify Plaintiffs of any pertinent FOIA request, pursuant to 5 U.S.C. § 552a(e)(8);
- (5) Award the Plaintiffs, pursuant to 28 U.S.C. § 2412, their costs as well as reasonable attorneys' fees incurred in prosecuting this action;
- (6) Grant such other legal and equitable relief as is just and appropriate.

Dated: August 24, 2011

Respectfully submitted,

  
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